What to do with Sovereignty?

'Principles of Law': Final Paper

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In this article, a number of positions are discussed on the question of how sovereignty could be reconciled with a context in which several legal orders seem to co-exist. In this discussion, the author recognises two camps: those who still believe in sovereignty as a foundational theory for the authority of the law, and those who reject such theories and propose a different account. After having assessed these opinions, the author concludes that the different theories either throw overboard constitutive characteristics of sovereignty in their attempt to save it, or do not succeed in proposing a convincing alternative account. As a conclusion, the author believes that the way to get out of the ongoing dilemma, is to recognise the EU as a sovereign state. This position has several benefits, of which the possibility to enhance the democratic character of the EU is the most important one.

Introduction

Foreign policy, just like any other policy domain, is regulated by law and is thus a part of the constitutional framework of a polity. When this polity turns out to be federal in its nature, things become more complicated: who is responsible for the conduct of foreign policy? Must that necessarily be the federal level of government, or perhaps the member states as well? In a confederate system, one could even argue for an exclusion of the federal level on all foreign policy matters.

When raising these questions, a lawyer, a political scientist or a legal or political philosopher will immediately bring the concept of sovereignty in the picture, because after all, is it not the bearer of sovereignty who needs to be responsible for foreign policy in a state? This idea immediately comes to our mind since we live in a world which is made out of sovereign States. Under international law, the absolute *numero uno* is, until today, the State. The philosophical foundation for this prominent role is the concept of sovereignty, and more precisely, the idea of external sovereignty. Indeed, it is commonplace to distinguish internal sovereignty from its external counterpart. The latter can also be called a 'negative' form of sovereignty: a state is externally sovereign when 'the totality of legal or political powers exercised within it is in fact subject to no higher power exercised from without'.[1] This notion is considered 'negative', since it does nothing more than delineate an area in which no one else but that State has the power to act. Hence, it does not refer to a subject, a body who is considered sovereign.[2] This idea has lead to the prominence of the principle of non-intervention under international law: within its borders, a State can do whatever it wants.

The counterpart of external sovereignty is the idea of internal sovereignty: is there any person who enjoys power without higher power internally to the state?[3] Within the boundaries which were protected by external sovereignty, Hobbes considered there to be a body which enjoyed an absolute and indivisible power to command. From an initial moment of consent, the people sought refuge in the arms of the *Leviathan*, for without its protection, life would be 'solitary, poor, nasty, brutish and short'.[4] Locke, another sovereignty thinker, proposed a concept of sovereignty with a more positive connotation: the people agreed on the installation of a sovereign because without a body which enjoyed powers, the protection of individual rights would be void. While Hobbes envisaged the submission to the *Leviathan* as absolute and irreversible, Locke regarded it more as a matter of continuous mutual consent, a contract liable to be ended whenever one or both parties wished to do so. From this philosophically groundbreaking work, later on refined by men like Rousseau and Buchanan, the idea of the nation-state has arisen, which soon became the standard paradigm for every state on the globe. The nation-state was sovereign, both externally (no other State had the right

[1] Neil MacCormick, "On Sovereignty and Post-Sovereignty," in *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 129.
[2] Paul W. Kahn, "The Question of Sovereignty," *Stanford Journal of International Law* 40 (2004): 261.
[3] MacCormick, "On Sovereignty and Post-Sovereignty," 129.
[4] Thomas Hobbes, *Leviathan*, hfdst. XIII, http://publicliterature.org/pdf/lvthn10.pdf.

to interfere with internal matters), and internally (there was one body in charge: be it the King (in Parliament or without Parliament), the people as a whole (popular sovereignty), or even some dictator).

It is interesting to witness that today both components of sovereignty are under pressure. On the one hand, in the practice of international law, external sovereignty is endangered. We are, one could say, evolving towards a more positive interpretation of the concept, one which contains some substantive content, like the notion of human rights. Under the banner of human rights, some States claim the right to intervene in other States. Should the international community allow M. Mugabe to let his population starve to death? Positive sovereignty is a notion of sovereignty where the question is raised: 'who am I?'.[5] It goes beyond the mere defence of the borders of your jurisdiction. This inevitably raises questions on identity: on what basis and in which way does a people as a whole construct an identity?[6] I ask our readers to keep this question in mind when reading this article.

On the other hand, we can observe that within the traditional nation state, there no longer is a single body (if there ever was) which enjoys ultimate authority. In a federal state, several levels of government both have a claim on sovereignty, be it a 'limited' kind of sovereignty, within the areas of jurisdiction appointed to them by the federal constitution, or an absolute kind, when a member unit contests the sovereignty of the federal level and claims independence, or 'sovereignty' as nationalists in Quebec prefer to call it. In Europe, we witness that internal sovereignty is also under pressure, not only because of regional sub-state nationalism, but even more because of the ever closer Union the EU is trying to construct. Here one could argue that internal sovereignty is under pressure as a consequence of the destruction of external sovereignty: actors external to the nation-state (the EU as a supranational organization, and the other Member States as constituent parts of that organisation) are tearing down the external borders of the nation-state to such an extent that internal sovereignty can no longer be considered existent, at least if you remain faithful to Hobbes' definition of it. The power of law-making, today is no longer in the hand of the aforementioned King, people, or dictator (the last one of course being excluded in the European context). What this evolution shows, I believe, is the simple fact that external and internal sovereignty are in reality two sides of the same coin. I would argue that they are the result of the artificial distinction that exists between domestic and international law. In that respect, Kelsen's vision of a monistic global legal order at least has the merit of being more coherent.

In this article, the question is raised whether the concept of sovereignty is still of any use today, in a context of what is often called 'legal pluralism' or 'constitutional pluralism', by Neil Walker defined as 'a position which holds that states are no longer the sole locus

[5] Kahn, "The Question of Sovereignty," 261.

[6] The distinction between positive and negative sovereignty, and the idea that the construction of a political identity is central in the understanding of the notion of sovereignty, are all ideas that I draw from the reading of an article by Paul W. Kahn, an international law professor at Yale University. See Kahn, "The Question of Sovereignty."

of constitutional authority, but are now joined by other sites, or putative sites of constitutional authority (...) and that the relationship between state and non-state sites is better viewed as heterarchical rather than hierarchical.'[7] Today, several legal orders influence each other and it is no longer clear where authority lies. Or is authority no longer needed in today's constitutional order? Lawyers, political scientists and legal and political philosophers have been struggling with this question for quite a while now.

What I will do in the following chapters is present and evaluate a number of positions in this area. Although it is of course impossible to reduce all existing positions to a few categories without proceeding to some form of generalisation, for practical reasons I will nevertheless try to do so. I believe most positions on this question can be brought back to two categories: the 'believers' and the 'non-believers'. The former hold on to the concept of sovereignty. To them, it still has a role to play in today's context. Within this category, all authors hold a position on a scale that goes from 'strong believer' to 'trying to save what is left'. Some legal thinkers – we could call them 'unitarists' – believe that sovereignty is as alive today as it has ever been. They believe that sovereignty is still absolute and indivisible and is to be found at one level of government only, be it the national or the supranational level. Supporters of this thesis are to be found in the constitutional courts of both the EU and its Member States.[8] Those who try to save what is left, are the ones who try to adapt the concept of sovereignty to the current 'pluralistic' situation. Walker, who considers sovereignty to be a *claim* to ultimate authority instead of a factual situation could be considered part of this category,[9] together with Kahn, who stresses the role sovereignty still plays in the construction of a political identity.[10] Maduro, I would argue, also belongs here. His theory revolves around the idea of 'competing sovereignties'[11]: this indicates that he does not want to throw sovereignty completely overboard.

The latter, non-believers, are the ones who reject the notion of sovereignty. They either claim it has disappeared,[12] or even, that it has been a mistake from day one.[13] Next to MacCormick and Eleftheriadis, Bellamy – with his concept of 'pre-sovereignty' – I believe also belongs to this category.

To conclude this already too extensive introduction, I would like to stress again in what light I will look at sovereignty in this article. 'Why is it reasonable that law, at the end of

[7] Neil Walker, "Late Sovereignty in the European Union," in *Sovereignty in Transition* (Oxford: Hart, 2006), 4.
[8] *Maastricht-Urteil,*, BvR 2134, 2159/92 (Bundesverfassungsgericht 1993); *Case 6-64, Flaminio Costa v. ENEL*, [1964] ECR 00585 (Court of Justice of the European Union 1964).
[9] Walker, "Late Sovereignty in the European Union."
[10] Kahn, "The Question of Sovereignty."
[11] Miguel Poiaeres Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," in *Sovereignty in Transition* (Oxford: Hart, 2006), 505.
[12] MacCormick, "On Sovereignty and Post-Sovereignty."
[13] Pavlos Eleftheriadis, "Law And Sovereignty," *Law and Philosophy* 29, no. 5 (4, 2010): 535-569.

the day, is tied up with *authority* imposing sanctions and using coercion?'[14] It is from this perspective, more precisely the quest to find a reason, a foundation of the authority of law, that I will look at sovereignty.

I The Believers

If you remain faithful to the traditional conception of sovereignty, meaning that there is one body which holds ultimate authority in a legal order, then what would happen to sovereignty when you are confronted with not one but two legal orders, who both have claims on one territory? If sovereignty is indivisible, I would say it has to belong to one of both contestants. A traditional conception of sovereignty, as developed by Austin[15] and Hobbes[16], simply does not allow sovereignty to be shared. This leads us to the question which claim of sovereignty corresponds with reality. In the context of the EU, are the Member States the holders of sovereignty, or has the EU become the sovereign in our lands? As mentioned above, constitutional courts of the EU and its Member States have opposite positions on this question. Until today, both parties uphold their claim to sovereignty, and it does not appear as if either one of them will change its mind.[17]

A Walker: From Factual to Putative Sovereignty

Walking down the line from 'strong believers' to those who 'try to save what is left', we meet Neil Walker. In fact, Walker does not allow to be categorised easily. His goal is to 'develop a persuasive conception of sovereignty to underpin and reflect the idea of constitutional pluralism.'[18] Hence, it already becomes clear that he does not categorically reject the notion of sovereignty. On the contrary, in his exposé, he tries to reconceptualise the concept to adapt it to today's context. How does he proceed? Before presenting his views on the possible reconceptualisation of sovereignty, I believe he tells us two crucial things. First, as for his vision on what 'the law' is and how it is created, he admits that he follows MacCormick. The function of the law is to 'provide an encompassing framework of normative order', he says.[19] He refers hereby explicitly to MacCormick's idea of the 'institutionalised normative order'.[20] Walker, like MacCormick, can be seen as a 'moralist': morality precedes the law, and authority appears to be secondary. Secondly, Walker gives away that he does not see the concept of sovereignty as a factual ultimate authority. Instead, he regards it as a 'speech act': a *claim* to ultimate authority.[21] Walker summarises these two points in the following: 'As a speech act, the capacity (of the law) to make a difference to the world depends upon its plausibility and

[14] Bert van Roermund en Geertrui van Overwalle, "Readings and Readings Notes on Principles of Law (Research Master Programme 2010-2011 Tilburg-Leuven)," Autumn 2010, 4.
[15] John Austin, *Lectures on jurisprudence, or, The philosophy of positive law*, 5e ed. (Clark N.J.: Lawbook Exchange, 2005).
[16] Hobbes, *Leviathan*.
[17] For an extensive account of these opposing claims, see Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," 502-511.
[18] Walker, "Late Sovereignty in the European Union," 5.
[19] Ibid., 7.
[20] Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 2001), hfdst. 1.
[21] Walker, "Late Sovereignty in the European Union," 6.

its acceptance as a way of knowing and ordering the world, which in turn depends upon its status as an "institutionalised" fact.'[22]

For Walker, reconceptualising sovereignty entails four elements. First, continuity. Secondly, distinctiveness. Thirdly, irreversibility. Finally, transformative potential. As for the first, Walker explains that in essence, sovereignty has not changed. It still has a *claim* on ultimate ordering power (which is something that has always been that way, Walker believes). As for the second, sovereignty has also changed, because it no longer has a claim on the ultimate ordering power in a certain territory (notice how Walker, like MacCormick uses the distinction between internal and external sovereignty[23]), but instead now claims ultimate ordering power on a functional basis. The EU, for example, claims sovereignty on all substantive matters contained in the Treaties. As a result, 'functional communities' or 'functionally limited polities' come into being. This is an important element for Walker, because it makes it 'possible to conceive of autonomy without territorial exclusivity'.[24] As for the third, just like before, a shift of sovereignty cannot be reversed. The difference with before, however, is that such a shift no longer entails the downfall of an entire state, but simply the downfall of a 'category' of non-state polities. As for the fourth and final element, Walker admits that the state of what he calls 'late sovereignty' is precarious. There are three reasons for this, he says, but elaborating on them would lead us too far.

Is Walker a 'believer' in sovereignty? I would say yes, he is. Nevertheless, a large *caveat* is required. There is a big difference between a claim, which is putative, and factual ultimate authority. Only the latter can be the foundation of the authority of the law. I, as a university student, can claim ultimate authority as well. Whether I would obtain it, is a different question.[25] This remark leads me to the conclusion that here, in a way perhaps similar to Maduro, Walker avoids answering the fundamental question of authority, but circles around it by changing the nature of sovereignty. On a more fundamental level, however, one could say that Walker did not believe in sovereignty from the beginning, since he – like MacCormick – sees the law as the result of a process of institutionalisation based on trust and acceptability by those who are asked to follow the law.[26] At the end of the day, I still consider Walker's theory as one of the most subtle ones. He combines elements of several thinkers and couches them into one coherent theory. However, when it comes to sovereignty, he does not achieve his own goal. He does not reconceptualise sovereignty to adapt it to today's context. Instead, he secretly, without admitting to do so, throws it overboard.

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[22] Ibid., 7.
[23] Cf. *infra*
[24] Walker, "Late Sovereignty in the European Union," 23.
[25] Kahn, when discussing the role sovereignty plays in constructing a political identity, rejects this idea of a putative interpretation of sovereignty for it takes away the role of sovereignty as providing meaning to a community. Kahn asks his readers: 'What is the imaginative structure that carries the citizen beyond the point of interpretative disagreement?'. See Kahn, "The Question of Sovereignty," 278-279.
[26] Walker, "Late Sovereignty in the European Union," 7.

B Maduro: Mixing up the functioning of the law and its foundation

Further down the path, we meet Maduro. After describing what he means by the idea of 'contrapunctual law', he raises the question whether this idea can by itself function as the foundation of the authority of the law.[27] Contrapunctual law is in many ways similar to the dialogical process of public justification presented by Bellamy[28], a difference being, however, that Bellamy presents it in a more specific way, focussing on the constitutional law aspects, while Maduro presents it more broadly, as an encompassing process of the creation (and the foundation of the authority) of the law: he states that the conflicts between legal orders should not be reduced to questions of ultimate authority, but that in every day legal practice, they constantly occur.

Maduro starts by 'dramatising', as Walker calls it,[29] the gap between the discourse of the EU Member States on the one hand, and the discourse of the EU on the other. Both parties claim to be the holder of sovereignty in our lands. Maduro calls for the introduction of an idea of 'competing sovereignties', which would be able to reconcile the claims of both parties.[30] To get to such a notion, Maduro starts by explaining that in reality, contrary to the traditional national or EU discourse, EU law is not constructed in a hierarchical way. In reality, EU law develops in the context of a constant 'multilogue' between a community of actors, which Maduro calls the 'European legal community'. He considers the European Court of Justice (ECJ) to be just one of the actors, albeit an important one. In no way the ECJ can impose certain solutions on the whole legal community. EU law is thus discursive in its nature, just like the law in the context of Bellamy's mixed constitution.

Maduro claims that EU law, because it is created in such a heterarchical way, challenges our traditional hierarchical conception of the law. He believes that because of the opposing claims of the Member States and the EU, a traditional conception of sovereignty as being a claim to ultimate authority, is no longer possible. We thus need to start looking for a new foundation for the authority of the law.

I do not agree with Maduro from the very start. Why would the existence of opposing claims imply that ultimate authority does not exist? As mentioned above, I, as a university student, can perfectly well claim ultimate authority. When looking at the United States (US), we see that occasionally, even over 200 years after the adoption of the federal Constitution, states still invoke their sovereignty to oppose federal legislation. Does that mean they are factually sovereign? Not at all. Furthermore, Maduro seems to mix up 'being bound by' and 'taking into consideration'. National courts have more and more eye for what is happening in other jurisdictions and take opinions of other courts into account. This, however, does not mean that they are bound by whatever that other court states. As we have seen earlier on, the question of the coming

[27] Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," 520.
[28] Cf. *infra*
[29] Walker, "Late Sovereignty in the European Union," 11.
[30] Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," 505.

into being of law and the question of its authority are being mixed up. If one accepts what I have just said in the above, one must conclude that Maduro's idea of making 'contrapunctual law' the foundation of the authority of the law, is built on quicksand.

However, the troubles do not end there. After having raised the question whether it would not be a good thing to leave the question of ultimate authority open (which I fiercely oppose), Maduro presents the core notion of his account: the idea of 'contrapunctual law'.[31] This notion consists of a set of principles, which national and EU legal actors (the courts) should take into account when developing the law. If everybody would make use of them, conflicts between legal orders would be prevented. In a way which reminds me of Kant's imperatives, Maduro presents in these principles the imperative for every judge to think of the coherence of the whole European legal order, the imperative to argue in universal terms so that solutions brought up by a judge in legal order A can also be applied by a judge in legal order B, etc.

Apart from the practical troubles these principles bring along (how can a judge take into account all the different situations in all the legal orders involved when deciding on a case?), there also is one fundamental theoretical problem: Maduro says that the claims to ultimate authority of both parties can exist next to each other as long as everyone respects the principles of contrapunctual law. But why should we respect them? What is the legal authority of these principles? Maduro seems to imply that there is no need for an overarching sovereign. As long as the principles of contrapunctual law are part of the national legal order, he believes that similar practical solutions will be found. This argument is not convincing, because if there is no guarantee that all legal orders will do so, the system is only as strong as its weakest link. And there will always be a weak link, especially in times of crisis. Moreover, a theoretical problem requires a theoretical solution. From an academic point of view, stating that a certain problem does not affect legal practice, brings us nowhere.[32] I argue that Maduro, in a way, shifts the question of ultimate authority to a next level. He tries to hide the problem, instead of solving it. Maduro claims to have found a theory in which no single sovereign is needed anymore, but right beneath the surface, such a sovereign is still very present.

C Kahn: an American perspective on the role of sovereignty

A crucial contributor to the debate on the role of sovereignty is without doubt Paul Kahn. Being a professor at Yale University, he gives an American account of the concept of sovereignty. Moreover, he studies the law from a cultural point of view. I believe he adds some important elements to the discussion of the role of sovereignty in a context where several legal orders seem to co-exist. More precisely, it is by throwing light on the religious origins of sovereignty and the function it has as a way of giving meaning, that

[31] Maduro of course refers to contrapunctual harmony, where several melodies can live side by side and create beautiful music.

[32] See here, Course 'Principles of Law' of 1 October 2010, where professor van Roermund defined the objective of our course, namely the quest for *theoretical* solutions to *theoretical* questions.

he provides us with the key to the solution of the deadlock in which sovereignty, I believe, is currently trapped.

Kahn establishes that sovereignty is crucial as to link the rule of law with the political identity of a people. Sovereignty is about giving meaning to the life of a political community. He here opposes those who look at politics as an end in itself to those who consider politics to be a means towards an end. 'For the former, politics was constitutive of identity, for the latter it is just one way of accomplishing various tasks.'[33] The point Kahn makes in his article is that in the US, sovereignty is still regarded as being constitutive for identity. This is to a large extent due to the religious origins of the American nation state. He traces back the origins of sovereignty, which were religious: 'The sovereign was a representation of the body of Christ (…). Just as the Church was the body of Christ, the state was the body of the sovereign.'[34]

Subsequently, Kahn points out that since Reformation, the belief in the Church as being the body which holds ultimate authority, the body that allowed to make the bridge between the finite and the sacred, has faded and in many cases disappeared. Protestantism said there was no need for a body between the believer and God. What matters is how you interpret the words of God in the Bible. Instead of seeking hail in a body like the Church, Protestants created what Kahn calls 'interpretative communities', who each have their opinion about the sacred. 'A protestant pluralism of interpretive communities is to displace the singular mystery of the sovereign body'.[35] In other words, the Church had to retreat and by doing so left a large void: what would now allow people to make the bridge between the finite and the sacred? The state, the body which constitutes political identity, filled the gap. In the US – the 'most protestant of all nations'[36], Kahn says – 'political identity has had an effective monopoly on the instantiated form of sacred meaning from the beginning.' In brief, 'the popular sovereign has replaced the divine sovereign'.[37] Or even more eloquently: 'the Constitution is our sacred text, and through law we participate in the sovereign will. The Supreme Court is our Temple and the Justices are our priests.'[38] Kahn refers here to the so-called 'civic religion' which exists in the US.[39]

[33] Kahn, "The Question of Sovereignty," 259.
[34] Ibid., 268.
[35] Ibid., 277.
[36] Ibid., 278.
[37] Ibid., 270.
[38] Ibid., 271.
[39] To avoid any confusion, Kahn does not say that political identity is tantamount to religious identity. The emergence of a civic religion as a means to construct a political identity has not lead to the disappearance of traditional religion. What he does say, however, is that because traditional religion has given up the claim to one single truth, the field has been made clear for another form of 'identity building' to occupy that field, namely political identity through the means of the political sovereign body.

Hence, for Kahn, the 'story of modern European political evolution is in a substantial part a story of the growing autonomy of the sovereign from the Church.'[40] Drawing from Schmitt, Kahn sees sovereignty as a religious conception that migrates to the political.[41]

I omit important elements of his theory,[42] but believe that the foregoing is sufficient to proceed. Once we understand this profound link between the rule of law and the political identity of the American people, we understand that Americans are quite sceptical towards theories which proclaim the end of sovereignty. The same accounts for Kahn. As mentioned earlier, a big evolution he witnesses today is the shift from politics as an end in itself towards a functionalist conception of politics. Due to globalisation, politics has been reduced to a tool to further increase economic output. In this instrumentalist conception he places polities as the EU, which he sees as a manifestation of 'transnational management'.[43] If politics is reduced to mere management, the function of giving meaning and constituting a political identity of a people can no longer be fulfilled. The bridge between 'being' and 'meaning' gets blown up.

Kahn believes there are big similarities in the effects Reformation had on the Church, and the effects globalisation has on the rule of law. Protestantism said that there was no need for a body between the believer and God. What matters is how you interpret the words of God in the Bible. When applying this to today's world, we see that because politics is reduced to some kind of interpretive disagreement among political communities (or applied to our case: among European legal orders), we end up with a kind of pluralism of opinions. Protestantism claimed that religion was not a matter of *being* the truth, but rather *representing* the truth. How fascinating it is to see these ideas reflected in the discourse of men like Neil Walker, who explicitly pleads for a conception of sovereignty as being a *claim* to ultimate authority, or Bellamy and alike, who see the (foundation of the) law as some kind of discursive process. Kahn does not believe in this, because it implies that the sacred ceases to be present as an 'instantiated form of meaning'. In other words: it blows the bridge up.

When we apply this 'sacred theory of sovereignty' to the case of the EU, we see that according to Kahn, all attempts to reconcile sovereignty with so-called 'constitutional pluralism' are futile. Kahn believes that there remains a deep need to 'find life through death', to 'overcome the body itself'.[44] If sovereignty disappears at one level, Kahn says, it is likely to reappear at another. If the Member States of the EU seem to have lost their sovereignty, then it is likely to reappear somewhere else. Where? I would like to see it

[40] Kahn, "The Question of Sovereignty," 268.
[41] Ibid., 269.
[42] Kahn elaborates extensively on the consequences of this conception of popular sovereignty as 'participation in the sacred'. He claims that it brings along the willingness to 'sacrifise' yourself for the nation. This can only be conceived in a system based on sovereignty. To illustrate this, he gives the example of American citizens who volunteer to fight in Iraq.
[43] Kahn, "The Question of Sovereignty," 264.
[44] Ibid., 281.

reappearing at the European level.[45] However, since the EU – perhaps because it refuses to recognise this identity building role of sovereignty – does not succeed in acquiring the democratic legitimacy it needs, we see sovereignty reappearing at a regional level, as the experiences of Scotland, Catalonia and Flanders illustrate.

Could it be argued that what Kahn tells us only applies to the US case? Has it not much to do with the religious origins of the US, being the 'most protestant nation of all'?[46] Here, I would like to make a distinction between the religious origins of sovereignty on the one hand, and the constitutive role of sovereignty in the political identity of a community on the other hand.

As for the latter, I believe that sovereignty performs the aforementioned role in all states we know, even when it does not appear in its 'popular' version. In the United Kingdom and other Commonwealth states, like Canada for example, the Crown is sovereign. Concerning Canada, the case I know the best, voices are often raised to abolish the monarchy. However, when looking at sovereignty from the perspective of Kahn, we realise that the monarchy, or the more abstract 'Crown', is a lot more than just an English old lady. It is what has always defined, and in a way still defines, what it means to be a Canadian citizen, and it is what unites the whole of Canada. On a more legal plane, it is also the Crown which guarantees the unity of the Canadian legal order. All powers are derived from the Crown. If you take the Crown away, necessarily an alternative will need to be looked for.

As for the former, I do not see why sovereignty, which has its roots in the European Christian religion, would not be able perform in Europe the role it has in the US. Even in traditionally catholic countries, the role of the Church as a unified body which makes the bridge between the finite and the sacred, is a thing of the past. I do not see any reason why Europeans would not feel the same need to 'find life through death' as Americans do. Moreover, on a theoretical plane, even though popular sovereignty as a foundational theory is not present in all EU Member States, this does not prevent us from introducing it at the European level.

This all being said, the crucial element in Kahn's discourse, which I will use further on, is the role of sovereignty in constructing a political identity of a people.

I The Non Believers

A Reasons to abolish sovereignty

While the believers try to find ways to reconcile sovereignty with the simultaneous existence of multiple legal orders which all have claims to ultimate authority, the non-believers state that the authority of the law in today's world can no longer be based on

[45] I plead for the creation of a European state, based on a theory of popular sovereignty. I will elaborate on this in the following.
[46] Kahn, "The Question of Sovereignty," 278.

the idea of sovereignty. In the articles I have read, a number of arguments came forward in favour of the abolishment of sovereignty. They are fourfold; I will call them 1) the constitutionalism argument, 2) the bloodshed argument, 3) the democracy argument and 4) the vagueness argument.

The constitutionalism argument

A recurrent criticism on sovereignty is related to the existence of the *Rechtsstaat*. Today, most western states' legal orders have a tradition of constitutionalism. MacCormick describes such a system as one in which 'the powers of state are effectively divided according to a constitutional scheme that is respected in the practical conduct of affairs'.[47] How can one uphold, if one accepts that the powers of the state are bound by rules that are prior to the state powers themselves, that these state powers are limitless? With Foucault's words, it seems as if sovereignty expresses both the power that enacts law and the law that restrains power: *pouvoir constituant* (political sovereignty) and *pouvoir constitué* (legal sovereignty).[48] We end up in a vicious circle.

MacCormick concludes from this that sovereignty is 'neither necessary to the existence of law and state nor even desirable'.[49] Eleftheriadis, in his article 'Law and Sovereignty', establishes by means of traditional logical reasoning, that sovereignty in its traditional form – which is until today the form which is most often used, he claims[50] – is incompatible with a constitutional tradition. 'Constitutional sovereignty' is not sovereignty at all, according to Eleftheriadis.[51] Bellamy adds to this discussion that the proposition to distinguish 'polity' and 'regime', and subsequently 'constitutive' and 'regulative rules' does not solve the problem either.[52] In this theory, the constitutive rules remain the same, while the regulative rules change. The authority of international or supranational regimes would still be situated at the level of the sovereign state, which merely decided to delegate a part of its power to the newly created order. It would then become possible for a sovereign state to limit the exercise of its own sovereignty. Bellamy rejects this thesis, for it seems to presuppose the existence of a *demos*, which holds ultimate authority. The *demos* is 'constitutive' of its own 'regime' But for what reason does this *demos* have the authority to do so? Here, the proposed theory does not offer an answer. This brings Bellamy to the conclusion that regimes are constitutive as well. Van Roermund might add here that the development of the legal order depends on an interaction between *pouvoir constituant* and *pouvoir constitué*.[53] In his contribution to

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[47] MacCormick, "On Sovereignty and Post-Sovereignty," 128.
[48] M. Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, red. G. Burchell, C. Gordon, en P. Miller (Wheatsheaf: Hemel Hempstead, 1991).
[49] MacCormick, "On Sovereignty and Post-Sovereignty," 128-129.
[50] Eleftheriadis, "Law And Sovereignty," 537.
[51] Ibid., 562.
[52] Richard Bellamy, "Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Right within the EU," in *Sovereignty in Transition*, 172-174. These distinctions have been made by Georg Sorenson in Georg Sorenson, "Sovereignty: Change and Continuity in a Fundamental Institution," *Political Studies* 47, no. 3 (1999): 590-604.
[53] See here, Course 'Principles of Law' of 12 November 2010, where van Roermund made the distinction of "authority 'under the law'" and "authority 'over the law'", which to him go hand in hand. See also Bert

Sovereignty in Transition, van Roermund also refuted the constitutionalism argument by pointing out that a system of constitutionalism still needs an agent to set that constitutional order. It does not come into being on its own.[54]

Hence, on the one hand, van Roermund sees the foundation of the authority of the law in a traditional sovereign sense: authority is vested in a sovereign body. This body enjoys the trust of its people, which then – together with a process of institutionalisation and the factual need for a society to have a means to *end* conflicts – gives the law the authority it needs.[55] On the other hand, the creation of the law cannot be reduced to the making of commands by the sovereign body, since the law appears to develop in a dialectical process between *pouvoir constituant* and *pouvoir constitué*. Moreover, the process of institutionalisation (which reminds me of the vision MacCormick has of the legal order as an 'institutionalised normative order'[56]) could not fit into such a conception of the creation of the law.

The bloodshed argument

Several authors link sovereignty with the bloodshed that has taken place in the 20th century. They state that the nation state, because of the importance of state sovereignty, did not have any conflict prevention or resolution tools when it came into contact with other nations. Sovereign nation states, being inward looking, did not know how to handle the confrontation with others. In the articles, MacCormick is the one who brings forth this argument most prominently.[57] It should however be noted, that other authors do not believe that sovereignty and violence should always go hand in hand. Walker, who is in favour of looking at sovereignty as a *claim* to ultimate authority instead of a state of affairs, rejects the bloodshed argument.[58] Authors who are in favour of the idea of a 'United States of Europe', for obvious reasons, reject the argument as well.[59]

It appears to me that the bloodshed argument plays a big role – albeit it often left unspoken – in the reticence of many authors to look at the European Union as a 'state' coming into being. The qualification of the EU as a *sui generis* entity, not a state but with 'state-like institutions' seems to me to be quite artificial. I believe, however, that this issue can be solved by making a distinction between a 'state' and a 'nation'. The examples of Switzerland, Canada, and – although more questionable today than in the past – Belgium, show us that it is possible for several 'nations' to exist together in one state. Calling the EU a state, with the institutions that come along with a state (I refer to the *trias politica*) would, I believe, make the EU an idea easier to conceive, which would make it easier for citizens to identify themselves with the EU. This would – in turn –

Van Roermund, "Sovereignty: Unpopular and Popular," in *Sovereignty in Transition* (Oxford: Hart, 2006), 39.

[54] Ibid., 37.

[55] See course 'Principles of Law' of 12 November 2010, where van Roermund gave three moral reasons to uphold the separation between law and morality.

[56] MacCormick, *Questioning Sovereignty*, hfdst. 1.

[57] MacCormick, "On Sovereignty and Post-Sovereignty," 126.

[58] Walker, "Late Sovereignty in the European Union," 8.

[59] G. Federico Mancini, "Europe: The Case for Statehood," *European Law Journal* 4, no. 1 (1998): 38.

improve the democratic character of the EU. Democracy requires involved citizens, as Montesquieu already pointed out. I do not see how a people can become democratically involved in the decision making process of a 'patchwork' polity without an answer to the question who or which office, in the end, gets to decide. The idea of leaving that question open, as Maduro suggests, is not at all an attractive one to me.[60] However, the EU should not become a nation. The exclusionary aspects of nation building ought to be avoided and are in direct opposition with the *unitas in diversitas* credo of the Union.

Democracy argument

Continuing on the topic of democracy, it was interesting to see how MacCormick gave another reason in favour of the abolishment of sovereignty. While many authors link sovereignty with democracy[61], MacCormick believes that sovereignty, and the centralisation that goes together with it, can lead to what he calls 'monolithic democracy'.[62] If one centralises, the democratic mass (meaning, the number of participants in the democratic system) becomes so big that the majority opinion of a certain minority might be in a minority position at the central level. If we abandon sovereignty and instead distribute competences according to the requirements of subsidiarity, the democratic rights of minorities could be better protected.

The fact that MacCormick, he himself a Scotsman, brings forward this argument is not a coincidence. I believe that his number one motivation of developing the concept of 'post-sovereignty' is to step away from the nation state paradigm in order to allow more freedom for nations without a state. From this perspective, he appears to see the EU as a means to strengthen his local 'nation': Scotland. Is he merely pleading for the abolishment of sovereignty at a national level to make it re-emerge at the local level? He himself would deny this, but by using the word 'popular sovereignty' when referring to the regions, he gives a different impression.

The vagueness argument

Another argument I encountered was the reproach of being vague. Walker signals this argument to immediately rebuff it. He refers to Krasner, who talks about 'four different meanings of sovereignty which are "not logically coupled, nor have they covaried in

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[60] Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," 522-523. Bellamy is aware of this problem, but believes that a 'mixed constitution' provides an answer to it. See Bellamy, "Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Right within the EU," 177.

[61] Kahn would agree that democracy and sovereignty go together for he sees sovereignty as a means to create a political identity of a people. Sovereignty leads to self-identification with the polity, and the possibility to 'sacrifice' yourself for it. Popular sovereignty can then be considered as sovereignty in its democratic version. See Kahn, "The Question of Sovereignty."

[62] MacCormick, "On Sovereignty and Post-Sovereignty," 134. Bellamy uses this argument as well, when pleading in favour of a mixed constitution: 'a mixed constitution is well suited to pluralist and complex societies, allowing policies to be responsive to local difference without the weakening or concern with the common good that sovereignty theorists fear.' Bellamy, however creates confusion. He pleads for the abolishment of sovereignty, but at the same time talks about 'shared sovereignty': 'Sharing and distributing sovereignty not only gives minorities a degree of autonomy, but also curbs their ability to act arbitrarily and independently...' See Bellamy, "Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Right within the EU," 186.

practice[63]" – namely domestic sovereignty, interdependence sovereignty, international legal sovereignty and Westhphalian sovereignty'.[64] For Walker, the interpretation of sovereignty as a *claim*, again brings rescue: he regards them as different operationalisations, in different contexts, of the same claim to ultimate ordering power.[65]

B Alternative solutions

In the solutions the authors propose, we see reflected a categorisation which van Roermund made in his contribution to *Sovereignty in Transition*.[66] More precisely, one author, namely Eleftheriadis, proposes social contract theory as an escape to the sovereignty problem.[67] Another author, MacCormick, seeks refuge in the distinction between internal and external sovereignty and claims that on the condition that the latter remains intact, the former is not necessary for the survival of a polity.[68]

Bellamy, who pleads for a 'mixed constitution', is a hard nut to crack. 'The challenge,' he says, 'has to be to retain certain key elements of (...) a sovereign system (...) within the new conditions of a post-sovereign world of multiple polities (...) without losing some of the welcome curbs on arbitrary power these developments have produced.'[69] Hence, it appears that he has an *à la carte* conception of sovereignty: he himself says further on that through his notion of a 'mixed constitution', he 'mixes these different quasi-sovereign agents and agencies so they cancel each other out, thereby de-sovereigntising sovereignty'.[70] To me, this looks like a contradiction. You cannot keep sovereignty and throw it away at the same time. Since he rejects the idea of ultimate authority, I classify Bellamy as a non-believer.

In the following, I will discuss some of the solutions the authors propose, and assess – more thoroughly than above – if they do or do not answer the question for which we seek an answer: what is the foundation of the authority of the law?

Pleading for a Post-Sovereign Era

After a careful reading of both MacCormick and Bellamy, I came to the conclusion that it would be best to treat them together. It seems, indeed, that in essence they are saying approximately the same thing. At the end of his discourse, Bellamy even explicitly refers to MacCormick and praises his presentation of the decision making process in the EU.[71] In what way does their core message correspond? It corresponds in saying that sovereignty, as conceived by Austin and Schmitt, is no longer necessary or desirable in

[63] S.D. Krasner, *Sovereignty, Organised Hypocrisy* (Princeton: Princeton University Press, 1999), 9.
[64] Walker, "Late Sovereignty in the European Union," 7.
[65] Ibid., 8.
[66] Van Roermund, "Sovereignty: Unpopular and Popular," 39-41.
[67] Eleftheriadis, "Law And Sovereignty," 561-569.
[68] MacCormick, "On Sovereignty and Post-Sovereignty," 126.
[69] Bellamy, "Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Right within the EU," 180.
[70] Ibid., 186.
[71] Ibid., 187.

the present context. With the emergence of the EU and the subsequent co-existence of several legal orders, ultimate authority does no longer appear to be in the hands of one body. Where do they differ? When it comes to external sovereignty, Bellamy goes further than MacCormick does: Bellamy says that external sovereignty no longer belongs to a single body.[72] MacCormick, however, thinks that external sovereignty has not been lost.[73] On the contrary, one could even say that the continuing existence of external sovereignty is a prerequisite for the (non-)existence of internal sovereignty.

How do both authors come to their conclusion? MacCormick, as already introduced above, has a traditional starting point: he presents several well known concepts.[74] He also starts his discourse by presenting the context in which traditional sovereignty theories came into being. He explains that during the life of both Hobbes and Locke, there was a strong need for foundational theories. After decades of religious wars, people were in need of some safe ground beneath their feet. This information is important, I believe, since it throws light on the context in which contemporary sovereignty theories come into being. It also puts in perspective their importance, since theories appear to follow practice, instead of creating it.[75]

After having established the difference between internal and external sovereignty, MacCormick makes a jump to conclude that 'even a strict definition of sovereignty permits a sense of divided or limited sovereignty'.[76] I, however, as I have already shown in the introduction of this article, do not believe in this distinction. However conceptually different they may be, in practice they overlap to a large extent. In the EU, the destruction of external sovereignty has made 'internal national sovereignty' disappear. MacCormick is too quick here, and this crucial passage is to me the weak spot in his theory.

Further on, he brings the concept of the *Rechtsstaat* into the picture. He says that 'law has to be explained in terms that do not presuppose the prior existence of an absolute political sovereignty'.[77] Drawing on his concept of the 'institutionalised normative order', which he presented in Chapter One of his book, he sees the law as an 'institutionalised system of rules and norms involving both duties which are required of legal subjects and powers vested in legal institutions holding legislative, executive, or judicial power.'[78] I believe that MacCormick would say that morality precedes law. I add

[72] Ibid., 184.
[73] MacCormick, "On Sovereignty and Post-Sovereignty," 132-133.
[74] À savoir : the distinction between legal and political sovereignty, between internal and external sovereignty, and the concepts of the *Rechtsstaat* and popular sovereignty.
[75] One could argue on this one, of course. When looking at myself, it could be argued that my vision on sovereignty in the EU is to a large extent influenced by recent events. When looking at how the EU and its Member States reacted to the financial crisis and the troubles the eurozone experienced, the question of 'what happens in times of crises' became very relevant again, and seemed to contradict what 'pluralist' theories claimed.
[76] MacCormick, "On Sovereignty and Post-Sovereignty," 130.
[77] Ibid., 128.
[78] Ibid.

here the same remark I made earlier on: the question of the way in which law is made, and the foundation of its authority, are distinct. Just like Maduro tries to make of his idea of 'contrapunctual law' the foundation of authority[79], MacCormick tries to do the same with his concept of the 'institutionalised normative order'. And if I am mistaken, the situation would even be worse, since in that case, he does not provide an answer at all. Until now, I am not convinced.

Bellamy proceeds differently. After having presented the two main positions in the debate (the 'pro-sovereignty view' and the 'post-sovereignty view'), he claims to have found a way to escape from this reductionist dichotomy by going back to 'pre-sovereignty' times. He refers to republican Rome, where – over 1500 years before Hobbes developed the idea of sovereignty – a system of checks and balances was in place, and power was shared and distributed over different actors, each representing a different class or group of interests. He calls this system one of a 'mixed constitution'. Subsequently, after having assessed the merits and drawbacks of the post-sovereignty position, he explains that this position is confronted with a paradox: '... the very processes that have tamed sovereignty have also rendered it both necessary and no longer possible.'[80] Hence, as mentioned earlier, we are in need of a theory which keeps what we need of sovereignty and throws away what we don't.[81] My criticism on this idea has already been pointed out earlier on: it is contradictory.

To Bellamy, 'a pre-sovereignty system involves bringing together democracy and the rule of law in such a way that there is neither legal nor political – including popular – sovereignty. Instead, people have to engage with each other as political equals and negotiate collective agreements.'[82] Again, Bellamy seems to be inspired by Maduro's idea of contrapunctual law, and even by MacCormick's idea of an 'institutionalised normative order'. The creation of the law is the result of a discourse, a dialogical process. For Bellamy, the key to the success of such a dialogue would be the concept of a mixed constitution that both distributes and shares power. By distributing, the law would be prevented from degenerating into a mere command. By sharing, Bellamy incorporates into the system an incentive to encourage all actors to be involved in the decision making process and to raise a continuous interest in the position of the other actors. He calls this process one of 'public justification'.[83] On the criticism that such a system corresponds with one of popular sovereignty, making of the imperative to 'hear the other' a new Grundnorm, Bellamy responds that this is not the case, since the incentive to 'hear the other' is not *presupposed* by the system, but *inherent* to it. He explicitly states that 'no agent or agency holds the power of supreme authority'.[84]

[79] Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," 520 et seq.
[80] Bellamy, "Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Right within the EU," 179.
[81] Ibid., 180.
[82] Ibid., 181.
[83] Ibid., 183.
[84] Ibid., 184.

But who is the holder of authority then? Just like MacCormick, Bellamy does not provide a clear answer. Is the process of 'hearing the other' intended as the foundation of authority? Apparently not. Or is there no need for authority at all and does morality precede the law? This does not appear to be the case either. In Bellamy's theory, authority is not completely absent. He distributes authority over the different institutions. 'The republican approach is effectively to mix these different quasi-sovereign agents and agencies so they cancel each other out,' he states.[85] Consequently, authority is present. Its foundation, however, can no longer be a theory of sovereignty, because by cancelling each other out, sovereignty gets 'de-sovereignitised'.[86] So what is the foundation of authority then? I did not find an answer.

Again, the author seems to confuse the process of creation and evolution of the law with the question of authority. I am a strong supporter of a system of separation of powers, where the different institutions can only come to decisions by working together, without one institution having the last word. But having such an institutional framework does not mean that sovereignty is distributed amongst these institutions, as to make the different 'sovereignties' cancel each other out. On the contrary, such a system can only work when being backed up by a theory of popular sovereignty.[87] In the US, both the executive and the legislative branch derive their authority from the mandate of the American people. Idem ditto in France, where both the Assemblée nationale and the Président are directly elected. In the US, even judges have a democratic legitimacy. Could it not be that theories on popular sovereignty have been developed to answer the question where authority lies in a democratic system of separation of powers?

'Constitutional sovereignty' as a contradiction

As van Roermund indicated, there are also thinkers who try to escape from the dilemma referred to in the paragraph on the constitutionalism argument by using social contract theory. Eleftheriadis is one of them. He establishes two things. First, by means of traditional logic reasoning, he demonstrates that sovereignty has never been a theoretical concept which could be combined with a constitutional tradition. 'Constitutional sovereignty' is a *contradictio in terminis*, he says. Secondly, he demonstrates that there is another way to account for the authority of the law, namely the use of a social contract which could be considered 'Rawlsian'[88] in its nature.

I will not go through the complete build up of his first argument, but I can say that his conclusion is that, if we remain faithful to the traditional conception of sovereignty, requiring absolute and indivisible authority, then a system in which authority is derived

[85] Ibid., 186.
[86] Ibid. Note that Bellamy's theory is confusing, because apparently he mixes up 'sovereignty' and 'authority'.
[87] In Canadian constitutional law, which I currently study, like in the UK, it is the Crown which is the holder of ultimate authority. This system is a coherent one. All state powers can be traced back to a single body. In that way, the coherence of the legal order is guaranteed (in theory, that is). For encouraging democratic decision making however, this version of sovereignty has disadvantages compared to the US idea of popular sovereignty.
[88] John Rawls, *A theory of justice.*, 2e ed. (Cambridge Mass.: Belknap, 2000).

from pre-existing legal rules is simply inconceivable as it entails that the power of the 'sovereign' is limited. Consequently, there is no difference between the sovereign and a simple legislator who is bound by constitutional rules. Eleftheriadis, who is a scholar active in England, uses the doctrine of Parliamentary sovereignty to make his point. Quite eloquently, he concludes by saying that 'in Austin's theory we have sovereignty without law, whereas in Hart's version we have law without sovereignty. In both cases, the idea of sovereignty is a distraction.'[89]

What interests me more is the second argument, where he presents his social contract theory under the names of 'political dominion' and 'civil condition'. From a normative starting point (he states that a command based system is not very desirable[90]), he goes on by saying that there is no author of the constitution.[91] Subsequently, just like Bellamy, Maduro and others, Eleftheriadis sees the constitutional order as the result of 'a process of doctrinal interpretation of the already existing law.'[92] The law is thus the result of a 'multilogue' (to use Bellamy's words) between several legal actors, and certainly not the result of the will of a sovereign. Let us immediately stress here, that again, the creation process of the law does not answer the question of authority. Eleftheriadis, unlike other authors we have discussed, provides a solution for this. Since he does not in an almost desperate way, I would say, try to save sovereignty, he can without secrecy and tricks propose a different account.

That account boils down to what Eleftheriadis calls the 'dominion of the commonwealth' or 'political society'. The law evolves through the dialectic between law and politics: 'the interpretative construction of the law is also partly a construction of the political authority that sustains and justifies the main institutions of the state'.[93] By saying this, Eleftheriadis points out that the basis of authority is not merely to be found in legal notions like the one of sovereignty (in its legal version that is), but in a theory of 'political society': a social contract theory.[94] Eleftheriadis means by this that the law can only evolve and be created in a context of 'active participation, consultation and decision of the majority of all citizens under a framework of equal respect and equal dignity'.[95]

But why should we need to participate in this process of participation, representation and decision making? Eleftheriadis claims that there exists a 'duty to enter into the civil

[89] Eleftheriadis, "Law And Sovereignty," 562.
[90] Ibid., 561.
[91] Ibid., 563. Eleftheriadis is thus of a similar opinion as Bellamy who also held that there is no single agent or agency holding absolute authority. See above, note 54.
[92] Ibid.
[93] Ibid., 564.
[94] Let us clarify from the very beginning that Hobbesian sovereignty also finds its origins in a social contract. However, as mentioned already, the moment of consent only mattered at the moment of concluding the contract. Locke did not agree, and looked at the agreement as ongoing. Sovereignty as it became a foundational theory for the nation state, is largely inspired by the Hobbesian interpretation. Our 'believers' try to save this tradition. Rawls, and here Eleftheriadis, appear to be fan of the Lockean version of sovereignty. When we realise this, it becomes clear that even Eleftheriadis, in a way, needs sovereignty to provide an answer to the question of the authority of the law.
[95] Eleftheriadis, "Law And Sovereignty," 565.

condition', which is based on a duty of justice. The authority of the constitution is based on the very existence of an arrangement between all actors. As long as reciprocity and equality are respected[96], people have a duty to respect the law. Here, we see how different Eleftheriadis is in his ideas on the authority of the law. He completely leaves the 'power thinking' behind and introduces an idea of Justice in his argument. Because it is the right thing to do so, people must participate in the process. It is their Duty. This duty, however, is conditional: it depends on equality and reciprocity. Eleftheriadis says that this duty is 'the result of legal interpretation and deliberation in the light of the moral and political principles that breathe life into our public institutions'.[97]

To summarise, one could say that, when talking about the creation process of the law, Eleftheriadis agrees with Bellamy, Maduro, MacCormick and Walker: law is the result of a discourse. On the authority question, he has a different opinion: it is based on consent.

How tempting his theory may be, as all social contract theories, Eleftheriadis' theory can easily be attacked by asking ourselves what would happen in a crisis situation. Who has the power of exception, as Schmitt would say? Who decides when things need to be done, and need to be done quickly? Would there not be a body that grasps power and decides in an authoritarian manner? Would there not be a *Leviathan* waiting for us when things get really bad? By basing the authority of the law on an idea of mutual consent, even if it is hypothetical as in Rawls's philosophy, I think you minimise the role power plays in the law. You could make a distinction here between 'normal times' and 'crisis times', and admit that the law functions differently in both situations. I believe that constitutionalism is an interesting idea and that it works well in normal times, but when things get rough, politics will take the lead.[98] When the Belgian king Baudouin refused to sign the abortion bill, politicians declared him in the 'incapacity to rule' for a few days. When Greece almost went bankrupt this year, European leaders decided to bail out the country, even though this is explicitly forbidden by the Treaties. I believe there are countless similar examples to be found.

[96] We clearly see the parallel with Rawls here, who also claimed that a kind of duty to follow the law existed as long as some basic principles were respected, amongst which the principle of liberty. Only if these fundamental principles were encroached upon, one was allowed not to follow the law. Eleftheriadis would say that as soon as reciprocity and equality disappear, and the law favours some and is disadvantageous to others, the authority of the law is undermined. See Rawls, *A theory of justice.*

[97] Eleftheriadis, "Law And Sovereignty," 567.

[98] We should note however, that different constitutional systems have tried to find a solution to this problem by incorporating crisis situations in the constitutional order. In France, for example, article 16 of the Constitution allows for the Président de la République to grasp 'absolute' power in times of crisis (which Charles de Gaulle effectively did during the Algerian crisis). Nevertheless, since the 2008 constitutional reform, the Conseil constitionnel will review the necessity of the invocation of article 16 after a period of 30 days. This solution, if we remain coherent, does not solve the question, because crises can take more time than 30 days, and there is no guarantee that the Conseil will be capable of fulfilling his functions. Moreover, if there are limits, then power is not absolute anymore.

Conclusion

This leads me to the double conclusion that first, sovereignty is certainly not dead and second, that constitutional pluralism and the theories of the different authors we have discussed all seem quite interesting on paper, but do not have eye for what happens in times of crisis. In such times, it becomes clear who is in charge. I do not believe that this still is the national state. The EU is like a high speed train we have launched 60 years ago, but which we cannot stop anymore. At every crisis, Europe tends to enlarge its powers. This happens not because of some secret double agenda of the institutions in Brussels, but because of processes of power which have been started up: processes of sovereignty, I could call them.

There is no way back. Leaving the EU is not a conceivable option, even though national constitutional courts like to uphold that it is. As a result, Member States will always choose the path of further integration, of further 'europeanisation', not because they like to do so, but because they have no real choice. Does anyone believe that Germany would leave the eurozone because of the crisis the euro is confronted with? Since we cannot stop this evolution, I believe we should instead accept it, and shift our focus from trying to protect our national independence, towards fully developing the EU as a state, in which real participation and representation of the *European* citizens becomes possible.

As I have discussed earlier on, I believe that by presenting the EU as a state, it would become easier for citizens to identify themselves with it. Building on Kahn, a sovereign EU could become constitutive of a political identity, which would lead to increased participation in the political process. This would in turn strengthen the democratic character of the EU. In that way, the power of the member states in the Council could more effectively be counterbalanced by the direct input of the European citizens. The EU would become a *federal* state, with a bicameral legislature, in which both its member units and its citizens are represented. Indeed, like the US. I do not believe that the arguments against statehood for the EU are convincing. As already mentioned above, statehood is not tantamount to nationhood. Habermasian constitutional patriotism does not equate nationalism rooted in a romantic idea of belonging to a single *Volk*.[99]

On a more theoretical plane, I conclude the following: the theories which try to combine constitutional pluralism and sovereignty do not function. Here, I agree with Eleftheriadis. The alternative he proposes, however, is not convincing either, since it does not take into account what happens in times of crisis. MacCormick's account sounds very tempting, because of the picture he presents us of a peaceful, democratic Europe, but he does not answer the authority-question either. The same accounts for Bellamy, whose ideas turned out to be quite similar to MacCormick's. Both Walker and Maduro simply do not answer the question they raise themselves.

Since none of the authors has been able to convince me of their case, I think the best thing to do is stick with what we already know. I like systems of checks and balances. I

[99] Mancini, "Europe: The Case for Statehood," 38.

believe they are the best way to prevent despotism. But organising your constitutional framework in such a way, does not lead to the disappearance of sovereignty. Ultimate authority has to lie somewhere. Where can we best place it? The 'people', being an abstract entity (can anyone ever tell what the 'people' as a whole really wants?), I believe is a safe bet. It allows for the existence of several institutions, all endowed with certain powers, and safeguards the unity of the legal order by laying the source of ultimate authority in a single unit, which on its turn 'delegates' powers to the institutions. If we accept that the EU is a state, this theory can be applied on the EU as well.

A criticism on this proposal could be made by returning the question of what happens in crisis situations. How could 'the people' be the body which holds ultimate authority? Is that not just as imaginative as placing ultimate authority in a form of discursive process? I believe not. By placing ultimate authority in the hands of the people, the possibility of self-renewal becomes incorporated in the system, and this – since the countervailing power of the trust of the people is a non-legal one – without falling in the trap of the constitutionalism argument. In times of crisis, institutions holding delegated power will try to deal with the situation, but they will only be able to do so for as long as they keep the trust of the people. If they lose this trust, the theory of popular sovereignty allows and even requires a change of direction. I do not see in what way the constitutional pluralism theories offer a similar benefit.

Sovereignty is not dead. To the contrary, I argue it is omnipresent. It is used in political discourse everywhere around the globe, and is thus in any case a social fact. It has the power to influence human behaviour, and should therefore not be ignored when designing a theory for the authority of the law. Sovereignty is there, we have to do something with it. Let us use it in our advantage and make from it the foundation of a democratic system, a democratic European state.

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